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Nos. 85-429, 85-430, 85-432, 85-440, and 85-444

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

EXXON CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

MARATHON PETROLEUM COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL, PETITIONERS

v.

EXXON CORPORATION AND UNITED STATES OF AMERICA

PHILADELPHIA ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL FREIGHT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS C. NEWKIRK
Chief Counsel
Economic Regulatory Administration
Department of Energy
Washington, D.C. 20585

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QUESTIONS PRESENTED

1. Whether crude oil price control regulations in effect between 1973 and 1981 required petitioner Exxon Corporation to calculate the amount of "new oil" at its Hawkins Field Unit by reference to the additional oil actually produced in the unit as a whole rather than by reference to production that Exxon shifted from one lease to another within the unit (No. 85-429).

2. Whether the regulations impermissibly discriminated between units formed at different times (No. 85-429).

3. Whether Exxon's suggested effective date for calculating new oil on a unit-wide basis was unreasonable as a matter of law (No. 85-429).

4. Whether Exxon was properly held liable for all of the crude oil overcharges that it caused (No. 85-429).

5. Whether the district court abused its discretion in ordering the restitution of crude oil overcharges through the States (Nos. 85-430, 85-432, 85-440, and 85-444).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-172a) is reported at 773 F.2d 1240. The opinion of the district court (Pet. App. 173a-268a) is reported at 561 F.Supp. 816.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1985, and petitions for rehearing were denied on August 15, 1985 (Pet. App. 269a-270a). The petitions for a writ of certiorari in Nos. 85-429 and 85-440 were filed on September 13, 1985. The petitions for a writ of certiorari in Nos. 85-430, 85-432, and 85-444 were filed on September 14, 1985. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.

STATEMENT

1. *Regulatory background. a.* In 1973, a predecessor agency to the Department of Energy (DOE)[2] promulgated Phase IV price controls for domestic crude oil pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. See 6 C.F.R. Pt. 150, Subpt. L (1974), 38 Fed. Reg. 22536, 22538-22543 (1973); see also 10 C.F.R. Pt. 212, Subpt. D (1975), 39 Fed. Reg. 1924, 1952 (1974) (regulations as repromulgated under the

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[1] "Pet." and "Pet. App." refer to the petition and appendix in No. 85-429.

[2] Hereafter, we will use DOE to refer to its predecessor agencies as well as to the Department itself. The various agencies are set forth in *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983). See Pet. App. 8a n.4, 173a n.1.

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*). These controls instituted a two-tier pricing mechanism designed to dampen the inflationary spiral in crude oil prices without eliminating economic incentives for increasing domestic production. See Pet. App. 9a, 175a, 206a.

The "primary statutory mandate [was] to hold down prices of crude oil" by setting a ceiling for the price of domestic oil which was already being produced, referred to as "old oil." Pet. App. 197a. Old oil was defined as the monthly production from a property that did not exceed the property's "base production control level" (BPCL), which was its production for the same month in 1972. Production in excess of the property's BPCL was deemed "new oil" that could be sold at prices above the controlled price for old oil, thus avoiding any disincentive for producers to discover new sources of oil and to increase the amounts of oil recovered from properties already in production. See *id.* at 9a, 196a; 6 C.F.R. 150.354 (1974), 38 Fed. Reg. at 22538; 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952.

Central to the two-tier system was the definition of the "property" for which the BPCL and current production were calculated. See 41 Fed. Reg. 4931, 4938 (1976). The regulations defined property as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952 (repromulgating 6 C.F.R. 150.354 (1974)).[3] Left to their own devices, producers might seek to " 'obtain higher prices by arranging production in such a way as to shift oil into the "new" category to the maximum extent possible.' " Pet. App. 197a (citation omitted). Accordingly, the defini-

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[3] In 1976, Section 212.72 was "grammatically altered" (Pet. App. 177a n.5) "without substantive change" (*id.* at 9a) to define property as "the right to produce domestic crude oil, which arises from a lease or from a fee interest." 41 Fed. Reg. at 4920.

tion of property in Section 212.72 was intended to be interpreted in light of DOE's " 'duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls.' " *Ibid.* (citation omitted).

b. This case arises out of DOE's interpretation of its definition of property, and hence its determination of the proper amount of new oil produced, with respect to unitized crude oil producing properties formed after 1972, the base year for computing the BPCL. Unitization is a "cooperative production process" for "large, multilease tracts which * * * [fomerly] operated as independent, competing properties." Pet. App. 177a. Under a "Unit Agreement," the "previously competing leaseholders * * * group their interests and form a single unit comprising all of the interests in the single reservoir of oil," which permits "enhanced recovery efforts [that] cause oil to flow underground across lease lines." *Id.* at 178a n.6. Following unitization, production from many wells is typically reduced or eliminated altogether while production from other wells within the unit is substantially increased. *Id.* at 15a, 178a n.6; 40 Fed. Reg. 40832 (1975).

DOE consistently interpreted the definition of property in Section 212.72 to require that the amount of new oil produced at units formed after 1972 be determined on a unit-wide basis, *i.e.*, by comparing the current monthly production from the unit with a BPCL consisting of the total amount produced during the same month in 1972 from all of the leases comprising the unit. See Pet. App. 10a; *Pennzoil Co.* v. *DOE*, 608 F.2d 156, 162-163 & n.11 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).[4] The agency published this position in Ruling 1975-15, 40 Fed. Reg. 40832 (1975), where it stated that a unit's "BPCL is the total 1972 monthly production from

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[4] Certain of these interpretations, Nos. 1974-22, 1975-2, 1975-4, 1975-10, and 1975-27, were later published at 42 Fed. Reg. 23723, 23726, 23730, 23740, 25659 (1977). See Pet. App. 10a, 178a n.7.

all of the several leases that now comprise the unit." This approach was "dictated * * * by the need to compare like quantities, [during and after] 1972, in order to ensure a meaningful application of the new [oil]" provisions. *Ibid.* Otherwise, the "distorted actual production from any one lease comprising the unit" (*ibid.*; emphasis omitted) resulting from the shifts in production that normally accompany unit-wide production would allow producers to take advantage of the higher prices permitted for new oil far beyond the actual increase, if any, in their production of oil. As DOE explained, "the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual increases in production from those leases since the base period." 41 Fed. Reg. 4931, 4937 (1976). For these reasons, the agency concluded that "the unit agreement signifies one right to produce crude oil" and that "the unit [therefore] defines the property" under Section 212.72 of the regulations. 40 Fed. Reg. at 40832. See Pet. App. 10a, 177a-179a.

c. In December 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*, in light of changes in the condition of the nation's oil supplies. The statute permitted for the first time "price increases, without current increases in production, when the agency found that such price increases would give incentives for 'enhanced recovery techniques.' " Pet. App. 10; see *id.* at 179a-180a.[5] In response to the new statute and industry comments, in February 1976 DOE promulgated a new regulation effective prospectively from

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[5] Absent such circumstances, Congress specifically prohibited regulatory changes permitting "an increase in the price for any volume of old crude oil production." 15 U.S.C. 757(b)(2). See Pet. App. 179a-180a.

February 1, 1976, 10 C.F.R. 212.75 (1977), 41 Fed. Reg. at 4941. Section 212.75 provided that a "producer shall, as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substantially altered (whichever date occurs first), establish a unit base production control level for the unit." Before that time, meaningful lease-by-lease comparisons would still be possible, and delaying implementation of the unit-wide BPCL would remove certain "disincentive[s] to the *prospective* unitization of properties." 41 Fed. Reg. at 4938 (emphasis added); see also *id.* at 4936-4937. The regulation defined "enhanced recovery" as "any method * * * of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." [6]

DOE also applied its more lenient approach toward unitized properties to existing units subject to Section 212.72 by rescinding ab initio "[t]hat limited portion of [Ruling 1975-15] which require[d] the producer *as of the effective date of unitization* to total all the BPCL's of participating leases and to treat the unit as a single property." 41 Fed. Reg. at 4937 (emphasis added). The agency reaffirmed the basic principle of Ruling 1975-15, embodied in 6 C.F.R. 212.72 (1975), that unitization normally requires unit-wide production comparisons in order to determine the true incremental increase in oil production; it concluded, however, that calculation of a unit-wide BPCL need not in every instance take place immediately upon unitization. 41 Fed. Reg. at 4937. Rather, DOE deter-

[6] The agency "ma[de] it clear" that its definition of enhanced recovery "would apply * * * so long as the '*energy employed* to move the crude oil through the reservoir is applied from extraneous sources.' The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source." 41 Fed. Reg. at 4938 (emphasis in original).

mined that a unit-wide BPCL need be implemented only after "there has been a significant alteration in pre-unitized producing patterns of the individual leases" or "enhanced recovery operations [have begun]." *Ibid.*; see generally Pet. App. 11a-12a, 180a-181a. The agency stated that at a later time it would further clarify the standard of a significant alteration in production patterns beyond its extensive reference in the preamble to the necessity for adopting a unit-wide BPCL where a meaningful comparison of pre- and post-base level production would not be possible on a lease-by-lease basis. 41 Fed. Reg. at 4937; see also 41 Fed. Reg. 36172, 36181 (1976). See generally Pet. App. 10a-12a, 180a-182a.

d. After receiving comments on the issue, DOE amended Section 212.75 in August 1976 to define "significant alteration in producing patterns" as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables [*i.e.*, maximum permitted production levels] for any property that constitutes the unitized property." 41 Fed. Reg. 36172, 36184. Once either of these events occurred, the BPCL was required to be calculated on a unit-wide basis. *Ibid.* At the same time, the agency further amended Section 212.75 "to eliminate any remaining disincentive to producers of new crude oil to enter unitized properties" by granting them the benefit of "imputed new oil," which ensured that newly formed units would be permitted to sell at least as much new oil as they had produced before unitization. 41 Fed. Reg. at 36182; see *id.* at 36184. See generally Pet. App. 12a, 182a.

e. In response to further comments, the agency clarified its amended Section 212.75 in Ruling 1977-2, issued in January 1977. 42 Fed. Reg. 4409. This ruling made clear that "Section 212.75, adopted on February 1, 1976, is applicable only to enhanced recovery unitized properties which established a unit BPCL on or after February 1,

1976." *Id.* at 4415. Units formed prior to that date, by contrast, were governed by Section 212.72, as reflected in Ruling 1975-15 (as modified on February 1, 1976). *Ibid.* The later definition of "significant alteration in producing patterns" promulgated in August 1976 would "be considered as guidance" with respect to determining the date on which a unit BPCL would be required for these earlier-formed units. *Ibid.* Producers would be permitted to attempt "to justify the establishment of the date of significant alteration in producing patterns" on other reasonable grounds "on a case-by-case basis." *Ibid.* DOE also explained that the special incentive of "imputed new oil" provided in the amendment to Section 212.75 effective September 1, 1976, was available only for units undergoing a significant alteration on or after that date. 42 Fed. Reg. at 4414. See Pet. App. 12a, 182a-183a.

2. *Factual background.* a. Oil was discovered in the Hawkins Field in Texas in 1940. Within a decade, more than 200 companies and individuals were producing oil on more than 300 leases in the field; by 1969, petitioner Exxon Corporation[7] owned two-thirds of the field's production. The Texas Railroad Commission regulated the competitive production of oil from Hawkins Field by setting "production allowables" limiting the amount of oil that could be produced from each well. The Commission also established a "maximum efficient rate of production" (MER), which limited the volume of oil that could be pumped from the field as a whole each day. Under the Commission's MER rules, any shortfall in a lease's daily production under its allowable was distributed pro rata to all of the other capable leases in the field in order to allow total production to remain at the MER level. Pet. App. 14a-15a, 183-184a.

Several years before the promulgation of crude oil price

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[7] Unless otherwise stated, we will use "petitioner" to refer to Exxon Corporation.

control regulations, petitioner and other owners of interests in Hawkins Field recognized the need to initiate enhanced recovery operations in order to arrest the decline in natural reservoir pressure that had occurred over the years and thereby to prolong the life of the field. In 1969, petitioner began to promote unitization of the field, which would spread the cost of recovery operations and permit the use of techniques that would move oil across lease lines. In preparation for unitization, the Commission authorized petitioner in 1969 to conduct a limited interim gas injection project and significantly increased the field's daily MER allowable. Pet. App. 15a-16a, 184a-185a.

During the extensive negotiations leading to a unit agreement, petitioner projected a net after-tax profit for the interest owners resulting from unitization of more than $250 million. This figure was based on an oil price substantially below the price at which *old* oil eventually sold under price controls. The unit agreement, ultimately signed in 1974, provided that petitioner would operate the unit beginning on January 1, 1975. Pet. App. 16a, 185a; R. 23881-23882, 24057, 24128-24130.

b. Following the promulgation of price controls in 1973, petitioner issued instructions to its employees requiring that each of its multi-lease units, including those (like Hawkins Field) formed after 1972, must be treated as a single property for price regulation purposes, and petitioner in fact followed those instructions at other post-1972 units. Pet. App. 16a-17a, 186a-187a. In July 1974 petitioner informed other Hawkins Field interest owners that, "[a]fter unitization, the field is treated as a single lease and exempt [*i.e.*, new] oil is calculated on a total field basis." R. 24366. As petitioner explained, this would result in "much less exempted oil volume than under nonunit operation." R. 24375; see also R. 24379, 24385. Notwithstanding the smaller amount of new oil that would be available under the unit price rule, 98.5% of

the working interest owners in Hawkins Field and 82% of its royalty interest owners had signed the unit agreement as of early August 1974. R. 24411; see also R. 18013-18014.

c. Shortly before unitization became effective, however, petitioner decided to depart from its prior representations to the Hawkins Field interest owners and from its pricing practices at other unitized fields by announcing that it would continue lease-by-lease accounting at Hawkins Field following unitization. Pet. App. 17a, 187a-188a. Once unitization began, petitioner was permitted by the state regulatory agency "to transfer production among wells within the unit, *at will.*" *Id.* at 16a (emphasis in original). Petitioner immediately took advantage of this new flexibility by shutting in more than 20% of the unit's wells, which enabled it to reduce production at 137 leases by nearly 320,000 barrels and to increase production by an equal amount at 65 other leases. *Id.* at 46a. Petitioner also substantially increased the volume of gas that it injected into the field. *Id.* at 49a-50a, 230a-231a.

In light of petitioner's continued lease-by-lease accounting following unitization, its transfer of production among leases "resulted in substantial increases in 'new' oil, without any actual increase in total production from the field." Pet. App. 46a. Petitioner "doggedly persisted, even in the face of the pellucid dictates of Ruling 1975-15, in applying individual lease accounting at the Hawkins Field." *Id.* at 234a (footnote omitted). It did not adopt a unit-wide BPCL until September 1, 1976. When it did so, petitioner performed its calculations under the more generous provisions of Section 212.75 of the regulations rather than under Section 212.72, even though the agency consistently had determined—and made explicit in January 1977—that Section 212.75 did not apply to units such as Hawkins Field that were formed prior to February 1976. Pet. App. 18a, 190a. Petitioner continued accounting on this basis until decontrol in 1981. Despite a "steady

decline in production" at Hawkins Field during the period that controls were in effect, petitioner's pricing practices ensured that "an *increasing* percentage of oil was accounted for by [petitioner] as upper-tier, higher-priced oil, until beginning June 1, 1979, almost all of the [production] was classified as new oil." *Id.* at 190a (emphasis added).

3. *Proceedings below.* a. The United States filed this action in the United States District Court for the District of Columbia, seeking restitution from petitioner of the overcharges that it caused by improperly computing the amount of new oil produced at Hawkins Field.[8] On cross-motions for summary judgment, the district court denied petitioner's motion and granted the government's motion to require restitution of all overcharges with interest. Pet. App. 173a-268a. The district court held that Section 212.72 of the regulations required the adoption of a unit-wide BPCL immediately upon unitization and that petitioner suffered no prejudice from application of the less stringent "significant alteration" test as "guidance" for determining the date at which calculation of such a BPCL was required. *Id.* at 206a-210a, 213a-214a. The district court rejected petitioner's contention that the government was estopped from enforcing its regulations, noting that "a regulated party as sophisticated as [petitioner]" could not reasonably "ignore[ ] the only existing official pronouncements" in favor of "unauthorized views of agency employees ferretted out by [petitioner] which happen to coincide with [its] self-interest." *Id.* at 234a.

The district court also determined that DOE's "sliding scale of incentives, though complex, reasonably carried

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[8] The government also sought civil penalties. The district court declined to assess a penalty, noting that while petitioner "ignor[ed] the unequivocal dictates" of the regulations, it "accurately represented its conduct to the agency." Pet. App. 260a. The government did not prosecute an appeal from this ruling. *Id.* at 5a.

out the conflicting objectives" of holding down prices while increasing production. Pet. App. 220a n.37. Accordingly, the agency did not act improperly in offering special benefits, such as imputed new oil, to producers that, unlike petitioner, had not found unitization economically attractive without those benefits. *Id.* at 214a-221a. "In refusing to go further and to extend greater benefits to pre-existing units" such as Hawkins Field, the district court reasoned, "the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Id.* at 220a. The district court also noted the "puzzling" nature of petitioner's attacks on Section 212.75, since even if that regulation were invalidated, Section 212.72, which set forth the definition of "property," nonetheless required implementation of a unit BPCL at Hawkins Field as of January 1, 1975. Pet. App. 227a n.39.

Giving petitioner the benefit of the relaxed requirement of Ruling 1977-2, and applying as guidance the definition in Section 212.75, the district court ruled that a unit BPCL was required under that definition as well on January 1, 1975, because a "significant alteration in producing patterns" occurred as of that date. Pet. App. 221a-231a. The district court reached this result in view of the increased injections of gas, increases in production allowables, and substantial transfer of production among leases that occurred simultaneously with unitization. The district court also concluded that, as a matter of law, petitioner had not offered any basis for the choice of a reasonable alternative date on which to begin unit-wide accounting. *Id.* at 226a-227a n.38.[9] Petitioner's reliance on the testimony of

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[9] The district court addressed this issue even though petitioner had not actually contended that its evidence established a reasonable alternative date within the definition set forth in the regulations and the question therefore was "not before the court." Pet. App. 226a n.38; see also *id.* at 52a-53a & n.26.

petroleum engineers with respect to the underground drive mechanism of the Hawkins Field reservoir would be unworkable, the district court found, because it would substitute "hard to decipher underground phenomena" for the "clear, easily administered test" adopted by DOE. *Id.* at 222a.

Finally, the district court held petitioner liable for the full amount of the overcharges from Hawkins Field because petitioner had caused those violations of the law by its pricing and production decisions as operator of the unit. Pet. App. 239a-259a. In light of the impossibility of identifying the ultimate victims of petitioner's actions, the district court exercised its equitable powers to order the funds to be deposited in an escrow account for distribution to the states in connection with specified energy conservation programs. *Id.* at 255a-256a.[10]

b. The court of appeals affirmed. Pet. App. 1a-172a.[11] Relying on its decision in *Pennzoil Co.* v. *DOE, supra,* the court of appeals held that Section 212.72 "required the establishment of a single BPCL upon unitization of the Hawkins Field." Pet. App. 29a. It further noted that Ruling 1975-15, which made this interpretation explicit, was later only partially rescinded and that the agency's focus remained on "the fact that lease-by-lease accounting was not permissible after some alteration in production methods precluded any 'meaningful comparison' of current and base period production." *Id.* at 30a.

The court of appeals agreed with the district court that, even under the relaxed application of Section 212.72 and

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[10] In view of the fact that the judgment was only a small fraction of petitioner's net worth, the district court relieved petitioner of the requirement that it post a bond pending appeal. See R. 31664.

[11] The panel was unanimous with respect to petitioner's liability. Judge Becker dissented in part solely on the ground that persons claiming to be actual victims of petitioner's overcharges should have been afforded an opportunity to prove the fact and amount of their damages. Pet. App. 93a-172a.

the significant alteration test, petitioner was required to adopt a unit BPCL for Hawkins Field as of January 1, 1975. *Id.* at 30a-39a, 43a-51a. The court of appeals rejected petitioner's contention that Hawkins Field never would have been unitized had the owners known that a unit BPCL was required, noting that petitioner "was well aware that Section 212.72 required adoption of unit-wide accounting upon unitization." *Id.* at 40a.[12] The court of appeals also concluded that the special benefits for prospective unitization provided in Section 212.75 were not arbitrary. *Id.* at 41a-43a.

The court of appeals rejected petitioner's argument that it had established a reasonable alternative basis for unit-wide accounting for two reasons. First, "any meaningful comparison of production levels between 'old' and 'new' oil on a lease-by-lease basis became impossible once production across lease lines began in January, 1975." Pet. App. 53a. Second, "any resort to the testimony of expert petroleum engineers * * * would be unworkable, and therefore, not a reasonable basis for determination of the question." *Id.* at 54a-55a.

Relying on its decision in *Sauder* v. *DOE,* 648 F.2d 1341 (Temp. Emer. Ct. App. 1981), the court of appeals agreed with the district court that petitioner was liable for all of the overcharges from the unit because "[t]he undisputed evidence" (Pet. App. 57a) demonstrated that petitioner caused those overcharges. *Id.* at 55a-61a. The court of appeals also held that the district court had properly exercised its equitable discretion in requiring petitioner to pay the full amount of the overcharges in view of petitioner's failure to follow the clear commands of the regulations. *Id.* at 76a-77a. Finally, the court of appeals upheld the

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[12] Unitization was attractive even under the unit BPCL requirement because it made possible the production of more oil for the unit as a whole than if the owners had continued competitive production and lease-by-lease accounting. See Pet. App. 40a; see also Pet. 2.

district court's order concerning disposition of the judgment. *Id.* at 78a-92a; see note 11, *supra*.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The Temporary Emergency Court of Appeals decided a narrow issue of regulatory construction under a program of emergency price controls that has long since expired and is of no continuing importance. As this Court has noted, Congress established TECA in order to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully considered the arguments presented in the petitions, and it rejected them in a thoughtful decision.[13] In these circumstances, further

[13] Petitioner Exxon's renewal (Pet. 27 n.24) of its prior attack (84-1142 Pet. 9-11) on the integrity and impartiality of the judges designated by the Chief Justice to serve on TECA is unwarranted and disrespectful of the judges who devote their time and energy to serving on that court. Petitioner's specious and impertinent claim that TECA's supposed partiality is "widely recognized" is not corroborated by the references on which it relies. Moreover, petitioner fails to support the implication of its allusion to the government's success in cases before TECA—*i.e.*, that those cases were wrongly decided. Rather, the outcome of cases in TECA reflects the insubstantial nature of many of the arguments raised in opposition to DOE positions, something further illustrated by Exxon's petition in this case. We note that our own informal survey indicates that the other courts of appeals have decided approximately 90% of appeals relating to the Emergency Petroleum Allocation Act on the merits in favor of the government. Finally, petitioner's characterization of TECA's treatment of the applicability of *INS* v. *Chadha*, 462 U.S. 919 (1983), to the price control program as "cavalier[]" (Pet. 39 n.33) is disingenuous at best. As petitioner well knows, that issue had already been conclusively decided against it by TECA in the court of appeals' comprehensive opinion in *Exxon Corp.* v. *DOE*, 744 F.2d 98 (1984), cert. denied, No. 84-188 (Dec. 3, 1984), and it therefore warranted little discussion here.

review is not warranted.[14]

1. Petitioner argues first (Pet. 27-29, 29-32)[15] that the regulations did not require it to adopt a unit-wide BPCL for Hawkins Field as of January 1, 1975. This argument is completely without merit.

a. The definition of property contained in Section 212.72 was promulgated by the agency in 1973. TECA has consistently held that that regulation, in itself, required the adoption of a unit BPCL immediately upon unitization. See *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 168 (1982), cert. dismissed, 459 U.S. 1190 (1983); *Francis Oil & Gas, Inc.* v. *Exxon Corp.*, 687 F.2d 484, 488, cert. denied, 459 U.S. 1010 (1982); *DOE* v. *Louisiana*, 690 F.2d 180, 190 (1982), cert. denied, 460 U.S. 1069 (1983); *Grigsby* v. *DOE*, 585 F.2d 1069 (1978), cert. denied, 440 U.S. 908 (1979). As TECA explained in *Pennzoil* (680 F.2d at 168):

> "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." [Citation omitted.]

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[14] Contrary to its repeated suggestions (Pet. i, 1, 2, 25, 42), the mere monetary size of petitioner's violations does not entitle it to further review in the absence of a legal issue of sufficient general significance to warrant this Court's attention. We note also that the constitutional garb in which petitioner dresses what are at bottom mundane challenges to an agency's exercise of discretion and interpretation of its own regulations was donned fairly late in the day. In almost 200 pages of briefs in the court of appeals, petitioner mentioned due process only twice. Cf. Pet. 2, 25, 26, 29, 31 n.29, 32, 42. Not until its petition for rehearing did petitioner expressly make its primary argument in constitutional terms, and then only very briefly (at 25-26). Thus petitioner "continues to shift ground" in this Court just as it did below. Pet. App. 53a n.28; see *id.* at 32a. See generally, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

[15] Petitioner Exxon attacks only the finding of liability (questions 1-4). The petitioners in Nos. 85-430, 85-432, 85-440, and 85-444 support the finding of liability and seek review only of the question whether the district court abused its discretion in ordering that the judgment fund be distributed through the several States (question 5). These issues are completely independent.

> The application of this definition to unitized properties plainly contemplates a single "property" or right to produce arising from the several leases or fee interests constituting the unit.
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> * * * * *
>
> [I]f upon unitization the "property" is no longer defined by each individual lease but by the unit as a single right to produce, it seems rather obvious that current production of the "property" after unitization must include all production from all of the leases within the unit.

Thus, even if DOE had done nothing further, Section 212.72 alone—which is how the regulations stood at the time that petitioner formed the unit and made its pricing decisions—required petitioner to adopt a unit BPCL for Hawkins Field on January 1, 1975. Pet. App. 38a.

Petitioner makes three responses.[16] First, it contends that the language of Section 212.72 required lease-by-lease accounting at unitized properties. Pet. 6, 27-28. This argument misreads the "plain language of the definition" and would in effect completely rewrite it. *Pennzoil,* 680 F.2d at 169; see *id.* at 168; Pet. App. 27a-29a. Moreover, it rests, like much of petitioner's argument (*e.g.*, Pet. 2, 9, 41), on an unreasonable and one-sided view that the overriding purpose of the price control regulations was to encourage production. As the courts below made clear, that goal was

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[16] All of these responses miss the point that petitioner's liability rested on its failure to satisfy the more lenient "significant alteration in production" standard of Ruling 1977-2 rather than the immediate unit-wide BPCL requirement of Ruling 1975-15. See Pet. App. 38a, 43a-51a. That petitioner was unable to qualify for the benefits provided by the more lenient standard is no reason to invalidate the agency's construction of its own regulations, which plainly were not intended to provide benefits to all units regardless of circumstances. Cf. *Placid Oil Co.* v. *FPC,* 483 F.2d 880, 905 (5th Cir. 1973), aff'd *sub. nom. Mobil Oil Co.* v. *FPC,* 417 U.S. 283 (1974).

only one of several and scarcely could be given controlling weight in disregard of the fundamental purpose of directly limiting the price increases that were plaguing the nation. See Pet. App. 9a, 175a, 197a, 206a.[17] Petitioner's reading of the regulation would utterly have failed to advance this purpose in a sensible fashion, for it would have allowed the creation on paper of new, higher-priced oil simply by shuffling production from one well to another without any actual increase in production. See pages 3-5, 10-11, *supra*. Indeed, it would have permitted crude oil producers to escape price controls altogether merely by joining forces with their neighbors and pumping all of their joint production out of one well rather than two. Finally, petitioner fails to give due deference to DOE's own interpretation, adopted in several contemporaneous rulings, that Section 212.72 required a unit BPCL immediately upon unitization, an interpretation faithful to the language of the regulation and to the underlying statutory and regulatory purposes. See, *e.g.*, Pet. App. 196a-197a; *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (citation omitted) (" '[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ").[18]

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[17] One searches in vain through the 42-page petition for even an acknowledgement that one purpose of price controls was to control prices.

[18] The fact that several of the interpretations (unlike Ruling 1975-15) were not published in the Federal Register until 1977 (see note 4, *supra*) does not detract from their probative value in demonstrating the agency's view of what its own regulations required. Of course petitioner could not have been bound by unpublished rulings; the point, however, is that the validly promulgated and published regulation itself required the practice that petitioner refused to adopt. In view of both Ruling 1975-15 and the agency's other contemporaneous interpretations of Section 212.72 to require a unit BPCL immediately upon unitization, petitioner's characterization of this understanding of the regulation as a "later *post hoc* rationalization[] of the agency's litigation attorneys" (Pet. 28 n.26) is contrary to fact.

Second, petitioner appears to suggest (Pet. 28 n.27, 41), although it avoids directly invoking the doctrine, that the government should, in effect, be estopped from enforcing Section 212.72 on the basis of alleged informal oral advice by some agency employees that lease-by-lease accounting of unitized properties was permissible, an argument that petitioner waived in the court of appeals. See Pet. App. 77a-78a n.41. Consistently with this Court's rulings, TECA has repeatedly held, as it did here, that the views of individual officials could not reasonably be relied on as those of the agency and cannot estop the government from enforcing the law. See Pet. App. 33a-34a; *Christmann & Welborn* v. *DOE*, 773 F.2d 317 (1985), cert. denied, No. 85-81 (Oct. 15, 1985); *Pennzoil Co.* v. *DOE*, 680 F.2d at 171-172. See generally, *e.g.*, *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). In any event, it is quite plain that petitioner did not rely on such advice in embarking upon unitization at Hawkins Field, for petitioner obtained the agreement of the other interest owners on the assumption that unit-wide accounting would be required, and it followed that practice at its other units as well. See pages 9-10, *supra*.[19]

Third, petitioner argues that DOE's partial rescission of Ruling 1975-15 in February 1976 vitiates all reliance on the agency's interpretation of Section 212.72 to require unit-

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[19] Without pausing to acknowledge the findings of the courts below, petitioner baldly asserts that Hawkins Field never would have been unitized had the interest owners known that a unit BPCL was required. Pet. 5-6, 31. The court of appeals expressly rejected this speculation (Pet. App. 40a), and it defies common sense as well as the factual record. Petitioner and the other Hawkins Field interest owners were quite obviously far better off financially once the reservoir was unitized even with the unit BPCL required by Section 212.72 because unitization allowed the production of substantially greater quantities of oil than would otherwise have been possible. See Pet. App. 15a, 40a-41a, 208a-209a n.30.

wide BPCLs. Pet. 27-29. In making this argument, petitioner completely misconstrues DOE's February 1976 ruling. The agency reaffirmed the principle of Section 212.72 and Ruling 1975-15 that unitization normally requires the adoption of a unit BPCL because lease-by-lease comparisons of production are no longer meaningful. 41 Fed. Reg. 4931, 4937 (1976). However, because it recognized that production patterns are not in every case realigned simultaneously with unitization, the agency relaxed the requirement that producers adopt a unit BPCL immediately upon unitization in favor of the "significant alteration in producing patterns" standard, which both was more sensitive to the changes that necessitated adoption of a unit BPCL and increased the incentives for unitization. See Pet. App. 30a-31. The result was a less stringent application of Section 212.72. But the agency most emphatically did not establish the propriety of the lease-by-lease accounting practices followed by petitioner, which resulted in increasing amounts of new oil being reported even as actual production declined. *Id.* at 190a.[20]

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[20] The agency made this clear at the time (41 Fed. Reg. at 4937):

> [I]n determining quantities of new * * * crude oil from a unit under the prior regulations, Ruling 1975-15 required that current total production from the unit exceed the total base production control levels for all the participating properties of the unit before any of the unit production qualifies as new crude oil.
>
> This result is dictated by the need to compare current production levels with like quantities of base production control levels in determining whether there has been an increase in production above base period levels. * * * [A] meaningful comparison could not ordinarily be obtained where current production figures from individual leases are compared with BPCL's from those leases, once there has been a realignment of producing patterns such as normally accompanies enhanced recovery. Thereafter, the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual

b. Petitioner argues as well (Pet. 29-31) that the new standard for determining the date for calculating new oil on a unit-wide basis embodied in the definition used in Section 212.75 could not be applied retroactively to Hawkins Field.[21] As both courts below noted, the argument is a curious one because invalidation of Section 212.75 would leave petitioner in no better position: it would still have been required to adopt a unit BPCL on January 1, 1975 under Section 212.72, as just discussed. Pet. App. 32a, 227a-228a n.39. In any event, retroactive application of the definition used in Section 212.75 is unobjectionable because it did not prejudice petitioner. Cf. *United States* v. *Caceres,* 440 U.S. 741, 752-753 & n.15 (1979); *American Farm Lines* v. *Black Ball Freight Serv-*

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increases in production.

> * * * [U]ntil such time as there has been a significant change in producing patterns, [however,] there is no reason for the unit operator to depart from the historical practice of determining quantities of new crude oil on a lease-by-lease basis.
>
> * * * Once enhanced recovery operations begin [or producing patterns are significantly altered before the actual implementation of enhanced recovery operations], the producer will be required to calculate a unitized BPCL * * *.

[21] Petitioner appears at times to suggest that even under the definition set forth in Section 212.75 or some ill-defined "generic standard," a significant change in producing patterns did not take place on January 1, 1975. See, *e.g.*, Pet. 23 n.21, 32 n.29. However, the record clearly establishes the extent to which petitioner shifted production among leases as of that date, thereby rendering meaningful lease-by-lease comparisons—the only possible "generic" touchstone—impossible. See page 10, *supra*. Moreover, it is undisputed that production allowables and gas injections increased, thereby triggering a unit BPCL requirement under the regulatory definition (contrary to petitioner's contention, the regulations did not require that the injected gas be obtained from sources outside the reservoir, see note 6, *supra*). It would, indeed, have been flatly inconsistent with the statutory purpose for the agency to have permitted the wholly illusory creation of higher-priced new oil for which petitioner argues. See Pet. App. 43a-51a (finding as a matter of law that a significant alteration of producing patterns occurred at Hawkins Field on January 1, 1975).

ice, 397 U.S. 532, 539 (1970); see generally *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947). Ruling 1977-2, using the definition in the new Section 212.75, was more favorable to producers than Ruling 1975-15, which strictly applied the old Section 212.72. Moreover, in making its decision to unitize, petitioner relied only on the less favorable prior standard requiring the immediate adoption of a unit BPCL. Pet. App. 38a-41a; see pages 9-10, *supra.*

2. Petitioner argues next (Pet. 32-35) that the additional incentives for unitization provided by the regulations for units formed after February 1976 were irrational. The courts below thoroughly discussed and correctly rejected this contention. Pet. App. 41a-43a, 214a-221a. As the district court noted, petitioner merely "seeks to wage the battle it lost when Section 212.75 was promulgated." *Id.* at 220a. DOE "performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Ibid.* The differing incentives available to units that were formed at different times or not yet formed reasonably balanced the conflicting goals of increasing production and holding down prices by offering additional benefits only to those producers for whom unitization would not otherwise have been profitable. See *DOE* v. *Louisiana,* 690 F.2d at 189. The purpose of Section 212.75 was "to remove any * * * regulatory impediments to the *formation* of units." 41 Fed. Reg. 36172, 36182 (1976). Since it was unnecessary to encourage something already accomplished, it was completely reasonable not to apply the incentive provisions of Section 212.75 to pre-existing units such as Hawkins Field. TECA, which has special expertise in this area, found no basis for setting aside the agency's exercise of discretion. There is no basis (or need, given the fact that the regulations have expired) for this Court to do so either. See generally, *e.g., Capital Cities Cable, Inc.* v. *Crisp,* No. 82-1795 (June 18, 1984), slip op. 15; *Heckler* v.

Campbell, 461 U.S. 458, 466 (1983); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).[22]

3. Petitioner argues next (Pet. 35-38) that it was denied an opportunity to present a reasonable alternative basis for beginning unit-wide accounting at Hawkins Field. Apparently, petitioner relies on the testimony of "fourteen petroleum engineering experts" concerning the underground drive mechanism of the reservoir and concluding that the most significant change occurred with the injection of inert gas beginning in 1977. See Pet. 17 n.15. Petitioner's argument misses the point. Both courts below fully credited petitioner's evidence. They properly concluded, however, that there was no factual dispute to be decided because petitioner's proferred alternative date was unreasonable as a matter of law. Pet. App. 52a-55a, 226a-227a n.38. Accordingly, no factual hearing was required. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973).[23]

The unreasonableness of petitioner's suggested date is apparent at once. Petitioner extensively realigned production patterns at Hawkins Field beginning on January 1, 1975. See page 10, *supra*; Pet. App. 46a, 228a-229a. As the district court explained, petitioner's "own measurements and analysis of production shifts at Hawkins Field show[ed] the dramatic changes that occurred in 1975," in-

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[22] In any event, as the courts below noted, petitioner's attack, if successful, would result only in the invalidation of certain of the benefits provided by Section 212.75, not the extension of those benefits to petitioner. Pet. App. 43a n.17, 219a n.35.

[23] Petitioner's grandiose invocation (Pet. 35-36) of the *Accardi* doctrine, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is irrelevant. Nothing in the agency's regulations provided that a completely meaningless factual hearing must be held where the producer's suggested alternative date fails as a matter of law. See also Fed. R. Civ. P. 56 (providing for summary judgment where there is no issue of material fact).

cluding a shift of "almost 20 percent of 1975 production * * * across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973." *Id.* at 229a-230a n.42. It was this substantial shift in production that allowed petitioner to claim most of its new oil even though total production from the field had not in fact increased, a result prohibited by the letter, and antithetical to the purposes, of the price control program. The agency had in fact repeatedly made crystal-clear that shifts such as those caused by petitioner at Hawkins Field rendered meaningful lease-by-lease comparisons impossible and therefore required the adoption of a unit BPCL. See, *e.g.*, *id.* at 53a; note 20, *supra.*

In short, petitioner's " 'realignment of the pattern of production would have played havoc with the federal pricing system had [the agency] permitted lease by lease property designations to continue in force after a unitization [because] [i]t would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases while other leases would be producing less or not at all.' " Pet. App. 54a (citation omitted). The underground drive mechanism of the reservoir is thus irrelevant and, in any event, too complex and amorphous to be relied upon as a workable regulatory standard. *Id.* at 54a-55a, 226a n.38.

4. Petitioner lastly takes issue (Pet. 38-41) with the amount of the judgment. Petitioner's reliance on the supposed equities in its favor is, as the court of appeals observed, for the most part "simply a recasting of its unsuccessful claim * * * that the Government was estopped from challenging the legality of lease-by-lease accounting." Pet. App. 77a. Contrary to petitioner's argument, the courts below fully considered the relevant mitigating factors; indeed, the district court, after "careful consideration of the voluminous record," declined to assess civil penalties against petitioner. *Id.* at 259a-260a.

By the same token, however, the district court refused "to excuse [petitioner's] behavior." *Id.* at 260a. As the district court noted, petitioner's pricing practices "ignor[ed] [the] unequivocal dictates of the regulations" and departed from petitioner's own construction and application of the regulations at its other units. *Ibid.* The court of appeals adopted the findings of the district court in this regard, *id.* at 77a, and they plainly warrant no further review.[24]

Petitioner's argument that its liability should have been limited to its own production from Hawkins Field was correctly rejected by TECA (Pet. App. 55a-61a) on the basis of that court's prior precedents. Moreover, this Court has recently declined to review the identical contention in *Christmann & Welborn* v. *DOE,* 773 F.2d 317 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-81 (Oct. 15, 1985); see also *Sauder* v. *DOE,* 648 F.2d 1341, 1347-1349 (Temp. Emer. Ct. App. 1981). There is no reason for a different result here.

Petitioner, which owned approximately 80% of the working interest in Hawkins Field, was the moving force behind unitization and the dominant force after unitization. Its liability rests on the fact that petitioner "caused the overcharges" throughout the unit and is therefore "fully liable for all of them." Pet. App. 55a. As sole operator of the unit, petitioner made all production and pricing decisions (*id.* at 57a (quoting district court's opinion)):

"[Petitioner] chose the wells to shut-in, the wells

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[24] Petitioner's challenge to the award of prejudgment interest rests on the same " 'considerations of fairness' " that it urges in mitigation of the award generally. Pet. 40-41 (quoting *Board of County Commissioners* v. *United States,* 308 U.S. 343, 352 (1939)). The argument was properly rejected by both courts below. Pet. App. 71a-76a, 258a-259a. Similarly, petitioner's suggestion that consumers were not injured by its overcharges (Pet. 39) ignores the fact that, "because of the nature of the Entitlements Program, and the price control regulations, the effect of [petitioner's] wrong had been spread throughout the distribution chain, to the ultimate consumers." Pet. App. 78a; see pages 28-29, *infra.*

> where production was to go up or down, where to inject gas, and how much. . . . Most important, [petitioner] decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized . . . later after Ruling 1975-15 was issued, . . . and finally when it switched to a unit BPCL under Section 212.75 in September 1976."

Thus, "[t]he undisputed evidence * * * supports the conclusion that [petitioner] is responsible for all of the overcharges." *Ibid.*[25]

TECA correctly concluded that operator liability is in accordance with the scheme established by Congress and is necessary to avoid a multiplicity of actions across the country against the almost 2500 owners of interests in Hawkins Field, which would " 'plunge the agency into an "administrative quagmire" * * * [and] effectively block enforcement of oil price controls at Hawkins Field.' " Pet. App. 57a (citations omitted). This conclusion by TECA, the court most familiar with the regulatory program at issue in this case, see *Tully* v. *Mobil Oil Corp.*, 455 U.S. at

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[25] Petitioner's argument (Pet. 39) that it cannot be held liable for overcharges attributable to Texaco's production from Hawkins Field was correctly rejected by TECA because the "uncontested facts established that [petitioner] did 'cause' th[ose] overcharges" as well as all of the others at the Hawkins Field Unit. Pet. App. 62a. Petitioner also renews in this Court (Pet. 23-24 n.22) a contention that TECA correctly ruled had not been properly preserved for appellate review (Pet. App. 66a-67a) concerning whether a small amount of the judgment had inadvertently been based on production from outside Hawkins Field. This claim apparently relates to production by a few owners whose tracts were in fact within the unit but who had not signed the unit agreement, production that in our view is properly encompassed within the judgment. In reviewing the record, we have not ascertained that any sales from tracts not within the Hawkins Field Unit were included in the judgment. In any event, petitioner's argument would have been more appropriately addressed to the lower courts through a motion to alter or amend the judgement had petitioner not already waived it.

248, is consistent with decisions of other courts of appeals in analogous contexts and warrants no further review. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *Tenneco Oil Co.* v. *FPC*, 442 F.2d 489 (5th Cir. 1971).

5. Finally, the petitioners in Nos. 85-430, 85-432, 85-440, and 85-444[26] argue that the district court abused its discretion in ordering that restitution of Exxon's overcharges be made through the several States rather than allowing consumers and direct and indirect purchasers of crude oil to attempt to prove that they suffered actual and quantifiable losses as a result of Exxon's violations. These petitioners intervened only very late in the day in the district court and offered little support there for the contentions that they now press.[27] Although for the most part they do not now detail the basis on which they are entitled to the overcharges, the remedy petitioners—which include refiners, distributors, and ultimate consumers of crude oil—offered in the court of appeals competing and

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[26] We refer to these parties as the "remedy petitioners."

[27] After the district court had taken the full case under advisement following completion of briefing and oral argument, two groups moved to intervene with respect to the remedy for Exxon's overcharges. One was a group of crude oil refiners that conceded that the remedy issue was a purely legal question capable of resolution by summary judgment on the existing record. See R. 38337. The other was a group of independent gasoline retailers that did not offer any evidence or request a hearing. See R. 38986. After entry of judgment, various other groups sought to intervene. The district court granted each application to intervene for purposes of appeal. Pet. App. 82a n.45, 130a-134a. Given the content and timing of the remedy petitioners' motions in the district court, the full consideration of their arguments by the court of appeals, and the legal nature of the question of the district court's authority to adopt the restitutionary remedy that it ordered, there is no doubt that the remedy petitioners were afforded ample opportunity to be heard. Indeed, many of their arguments should properly be considered waived in view of the proceedings in the district court.

mutually contradictory theories for why each of them has the most compelling claim to the award.

a. The district court's order represents an unexceptional exercise of its broad equitable discretion to make restitution in a workable manner consistent with the goals of the statutory and regulatory scheme. TECA affirmed on the basis of its understanding of the operation of a complex set of regulations, no longer in effect, that governed pricing decisions in the petroleum industry. The court of appeals simply upheld one possible remedy as having appropriately been adopted in this case, without mandating the same approach in future cases. Moreover, the remedy adopted by the district court has no application outside the narrow confines of the now-defunct price control program because of the special nature of the government's cause of action and the unusual operation of the regulations at issue. See, *e.g.*, *In re DOE Stripper Well Exemption Litigation,* 578 F. Supp. 586, 592-593 (D. Kan. 1983) (noting differences between public price control and private antitrust actions). Finally, DOE recently has developed a restitutionary policy and proposed legislation that would apply to overcharges recovered in other oil price control cases. See 85-444 Pet. App. B1-B10, B14, B19-B22. In view of the factbound nature of the decision below, the procedural circumstances in which it was made, and its lack of continuing importance, further review by this Court is not warranted.

b. In any event, the remedy fashioned by the district court is well within the broad scope of its remedial power " 'to do equity and to mould [its] decree to the necessities of the particular case.' " *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), quoting *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944). Under the "Entitlements Program" then in effect, refiners with proportionally greater access to lower-priced old oil were required to make cash payments to refiners with relatively less access to such oil. In this way, the regulations "spread the benefits of access

to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products." *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976); see Pet. App. 87a-88a. 247a-248a. Other regulations permitted refiners to pass through increased costs to their customers. Pet. App. 87a-89a, 249a. "As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges * * * were borne by ultimate consumers of petroleum products throughout the entire country." *Id.* at 249a (footnote omitted).[28]

It is little wonder then that both courts below found that "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." Pet. App. 250a.[29] As the court of appeals concluded, "any attempt to trace increased costs attributable to the [Hawkins Field] overcharges

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[28] Certain of the remedy petitioners argue (*e.g.*, 85-430 Pet. 23) that this conclusion is questionable in light of the decontrol of prices of certain petroleum products before 1981. The absence of a specific regulation permitting refiners to pass through increased costs for those products, however, does not mean that the additional costs were not in fact passed through, nor does it simplify the ultimate task of identifying the actual victims of Exxon's overcharges and the extent of their injury. See generally *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968) (noting difficulty of determining actual effect of price change "in the real economic world rather than an economist's hypothetical model").

[29] Indeed, it was admitted by many of the parties below that any attempt to trace the overcharges would be impossible. See Memorandum in Support of Conditional Motion of Indicated Refiners to Intervene 5, R. 38973 ("it is impossible to trace the impact of the overcharges directly to any subsequent purchasers"); Memorandum of National Freight et al. in Support of Motion to Intervene 2, R. 38547 ("it is administratively impracticable to attempt to entertain specific claims based on specific overcharges to identified customers"); Gladieux Br.

would require a full scale audit of the entire petroleum industry, and * * * any effort to do so would be futile." *Id.* at 88a. There is no basis for this Court to set aside this concurrent conclusion of both TECA and the district court.[30]

Nor is there any basis on which to disagree with TECA's

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9 ("[n]o such findings could possibly be made without an extremely time-consuming factual inquiry, one which is almost certainly beyond the capacity of any Court or administrative agency"); Marathon Br. 17 ("proving passthrough of overcharges would depend entirely on uncertain economic assumptions and impossibly complex measurements").

[30] The remedy petitioners rely on a report issued by DOE's Office of Hearings and Appeals (OHA) in another case (85-432 Pet. App. A321-A385) to argue (*e.g.*, 85-432 Pet. 13-14) that econometric modeling techniques are available that could identify within a broad range the percentages of overcharges that were absorbed by refiners. As OHA itself made clear, however (*e.g.*, 85-432 Pet. App. A343), and as DOE has reaffirmed, these figures "say [] nothing about the amount of the overcharges any particular refiner may have absorbed. * * * [S]ome refiners necessarily will have absorbed amounts less than the average while others obviously absorbed more." 85-444 Pet. App. B3 (DOE Statement of Restitutionary Policy). Thus, "any matching between the amount a particular refiner receive[d] and the amount of harm [that it] suffered * * * [would be] purely coincidental." *Id.* at B4. Moreover, "refunds based upon the econometric method developed by OHA would entail considerable administrative costs and very long delays before distribution. It could require further hearings or an individual claims procedure where innumerable direct purchasers could be given an opportunity to substantiate their individual claims. * * * The appropriateness of the burden, cost and delay of these further proceedings is problematic in view of the small percentage of the overcharges that would actually be distributed under such a method." *Id.* at B5-B6. Finally, even OHA's modeling estimates entailed "great inexactitude." *Id.* at B4; see 85-432 Pet. App. A383 (concluding that refiners as a class may have absorbed as little as 2.7% or as much as 8.1% of the overcharges). Certainly no court should be *required* to undertake the expense and delay of a claims procedure based on econometric models so inherently imprecise.

In a supplemental brief in support of their petition in No. 85-430, Marathon Petroleum Co., et al. (Marathon) attack OHA's actual report, primarily on the basis of correspondence from a Member of

conclusion that the remedy adopted by the district court is "equitable and fair, and a reasonable method of compensating the consuming public for the [Hawkins Field] overcharges." Pet. App. 91a. The district court modeled its remedy on the one adopted by Congress in the Warner Amendment, Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (85-432 Pet. App. A316-A319), with respect to restitution of other petroleum overcharges. Pet. App. 254a-256a.[31] By earmarking funds for specific energy conservation programs, the Warner Amendment was designed "to benefit the class of persons injured by [oil price control] violations." 85-432 Pet. App. A316. Congress recognized that these conservation programs benefit the public at large by reducing our dependence on foreign oil. See S. Rep. 94-1119, 94th Cong., 2d Sess. 52 (1976); see also Pet. App. 256a. The remedy in this case thus "accomplishes the intent of Congress" (Pet. App. 91a) by

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Congress concerning an earlier draft of the report that was not adopted. TECA correctly rejected Marathon's eleventh-hour attempt to interject this incompetent and irrelevant evidence into the record (85-430 Supp. Br. App. 1a), and there is no reason for this Court to do otherwise. The OHA report recently was issued in a completely separate case and was not cited by either court in this action. See Pet. App. 80a n.43. The unsubstantiated allegations on which Marathon relies therefore could not possibly affect the outcome of the instant case.

[31] Contrary to the remedy petitioners' argument (*e.g.*, No. 85-430 Pet. 19), Congress did not intend through the Warner Amendment to prohibit courts from adopting similar restitutionary remedies in other cases. See 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (remarks of Sen. Kennedy). There is neither an express nor an implied indication in the Warner Amendment that Congress intended to limit the broad remedial authority inherently possessed by the courts in cases of this kind, see *Porter* v. *Warner Holding Co.*, 328 U.S. at 398, a limit that would have been a simple matter to articulate had Congress desired to do so. Finally, the district court made it clear that it was not relying on any implication of authority in the Warner Amendment itself but only on its "broad equitable powers to order restitution." Pet. App. 256a (footnote omitted).

helping "to relieve consumers of some of the burden of towering oil costs" (*id.* at 256a), a burden that was increased by "[t]he colossal scale of Exxon's wrongdoing" (*ibid.*). As TECA concluded (*id.* at 92a (footnote omitted)):

> While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest.

There is simply no warrant for upsetting the reasoned exercise of discretion affirmed below.

c. The remedy petitioners contend, however, that the failure of the courts below to permit them to present evidence of the fact and amount of their actual injuries was inconsistent with due process and restitutionary principles. This argument is completely without merit. This case is a government enforcement action pursuant to Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. As TECA repeatedly has emphasized, "[a]ctions by the United States under ESA Section 209 are taken to enforce public, not private rights." Pet. App. 82a-83a (quotation marks and citations omitted). Section 209 does not create a cause of action on behalf of private persons who were injured by violations of the petroleum price regulations—that was provided by Congress in Section 210 of the Act, which is not at issue here. Because the remedy petitioners were not entitled to recover damages by way of restitution in this action, due process did not require that they be permitted to present evidence in support of their claims. Indeed, as the court of appeals noted, they were not even proper intervenors as of right. Pet. App. 83a (quoting *Cities Service Co.* v. *DOE*, 715 F.2d 572, 573-574 (Temp. Emer. Ct. App. 1983)). Cf. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689

(1961); see also, *e.g.*, *United States* v. *Automobile Manufacturers Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd *sub nom. City of New York* v. *United States*, 397 U.S. 248 (1969). The remedy petitioners thus were afforded ample, or more than ample, process by being permitted to raise their arguments below; nothing in the Due Process Clause requires that those arguments be accepted.

The cases on which the remedy petitioners rely (*e.g.*, 85-430 Pet. 12, 16) are unavailing. None of these cases establishes a protected property interest in a restitutionary fund that results from a government enforcement proceeding or otherwise requires that such a fund be distributed, whatever the administrative costs, on an individual basis to persons claiming to be the ultimate victims of illegal private activity. In *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949), for example, funds had been paid into the court of appeals pursuant to that court's stay of an administrative order reducing natural gas rates. This Court held that, to the extent possible without "prolonged litigation," the court of appeals was required to "determine who suffered a loss as a result of the court's action in granting the stay." *Id.* at 584. Nothing in the Court's opinion purports to impose a duty on courts of equity to hold proceedings to attempt to identify the ultimate victims of an overcharge (especially one not resulting from an erroneous court order) where that has reasonably been determined to be impossible. Similarly, in *Porter* v. *Warner Holding Co., supra,* the Court held only that federal courts possess inherent equitable authority to order that a landlord's overcharges, which violated the Emergency Price Control Act of 1942, be restored to its tenants. The Court did not undertake to limit that equitable authority in the manner for which the remedy petitioners contend.

In sum, the restitutionary remedy under Section 209 is a government enforcement mechanism whose "central purpose * * * is to determine the amount by which the wrong-

doer has been unjustly enriched, and then to make him disgorge that amount." *Citronelle-Mobile Gathering, Inc.* v. *Edwards,* 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982).[32] Section 209 "is not designed to provide redress for a victim who has suffered an injury because of a violation of a [price control] regulation." *Bulzan* v. *Atlantic Richfield Co.,* 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980). If compensation results, it is only as a "by-product of the agency's effort to reestablish compliance with its regulatory scheme." *Ibid.* Accordingly, Section 209, which evinces no intention "to limit the power of the courts or the agency * * * to a particularly strict interpretation of restitution," *Sauder* v. *DOE,* 648 F.2d at 1348, neither establishes in private persons an entitlement to disgorged funds nor requires a wasteful and ultimately futile attempt to determine the extent to which various persons or groups of persons were injured. While the district court was not compelled to shape the remedy precisely as it did, it acted well within its discretion by patterning the remedy after one established by Congress and directing that the funds be used in a manner that will help to undo the damage caused by the regulatory violations in this case.

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[32] TECA carefully distinguished the factual circumstances presented here from those in *Citronelle-Mobile,* which, it observed, involved only a single refiner, a single product, and identifiable customers. See Pet. App. 85a-87a. Even if the remedy petitioners were correct in contending (*e.g.*, 85-432 Pet. 24) that there is a conflict between that case and this one, the existence of such an intra-circuit conflict, which TECA is well able to resolve in the future, would be an argument against, not for, review here. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General**

THOMAS C. NEWKIRK
Chief Counsel
Economic Regulatory Administration
Department of Energy

DECEMBER 1985

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* The Solicitor General is disqualified in these cases.

U.S. GOVERNMENT PRINTING OFFICE: 1985—491-507/20108